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Premjeet Kaur a/p Nika Singh v Chief Inspector Wong Peng Teck & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 21NCVC-46 OF 2011
AMELIA TEE ABDULLAH JC
25 JULY 2011

Civil Procedure — Striking out — Action — Action wrongful arrest and confinement against police — Failure to name as parties the persons who actually committed tortious acts against plaintiff — Whether allegations of negligence and mala fide against police clearly unsustainable — Whether plain and obvious case for striking out — Rules of the High Court 1980 O 18 r 19(1)(a), (b) & (d)

Civil Procedure — Striking out — Action — Delay — Application for striking out after action set down for trial — Whether striking out application an afterthought or designed to delay hearing of action — Whether application to be allowed

Civil Procedure — Striking out — Action — Whether entering unconditional appearance precluded defendant from filing striking out application

Tort — Damages — Negligence — Wrongful arrest and confinement — Plaintiff detained by immigration and handed over to police in handcuffs for purported investigation of a fraud case — Plaintiff detained in lock up — Whether police acted negligently and mala fide — Whether action commenced against proper defendants — Failure to name as parties the persons who actually committed tortious acts against plaintiff — Allegations of negligence and mala fide against police clearly unsustainable — Government Proceedings Act 1956 ss 5 & 6

The plaintiff claimed that a false police report had been lodged against her by one Vijay Krishnan Mehta. She claimed that despite lodging a police report on 12 April 2007 and exhibiting a copy of her passport which showed that she was in Singapore between 8 June 2004 and 22 June 2004, and writing a letter dated 31 May 2007 to the first defendant as the investigating officer, that she was not called to have her statement recorded. Instead, she was detained by the Malaysian Immigration and handed over to the police at the Second Link. She was then handed over to a police officer from Balai Police Larkin, handcuffed in front of many people and brought to Larkin where she was detained in the lock up. She was only informed that she was being detained in relation to a fraud case involving millions of Ringgit and produced before the magistrate on

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24 February 2008. On 26 February 2008, the plaintiff lodged a police report against the first defendant in connection with the latter's negligent and mala fide actions. She had also written several letters to the first defendant to express her readiness to attend for purposes of investigation but had received no response. The plaintiff claimed that following her detention by the police where she was handcuffed and had to spend a night in the lockup, she had suffered stress and her mental and physical health declined and she had to seek psychiatric treatment. The defendants claimed that the first and second defendants were not the parties who had arrested and detained the plaintiff and that they were therefore not the right parties to be sued in this case. The defendants applied to strike out the plaintiff's writ of summons and statement of claim under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC') on the following grounds: (i) that the plaintiff had failed to name the tortfeasors in the claim; and (ii) that the second defendant should not have been named as a defendant. The plaintiff raised a preliminary objection to the effect that the defendants' application was defective in that the defendants had failed to enter conditional appearance as provided under O 12 r 6 of the RHC before filing the present application. Instead, the defendants had filed their statement of defence. The plaintiff further contended that an application for striking out must be refused after the action has been set down for trial.

Held, striking out the plaintiff's claim with costs:

(1) The court was inclined to follow the decisions in *N Carrupaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389, *Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme & Ors* [1987] 2 MLJ 633 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 in finding that the filing of an unconditional appearance by the defendants do not preclude them from filing a striking out application under O 18 r 19 of the RHC (see para 15).

(2) On the strength of ss 5 and 6 of the Government Proceedings Act 1956, the law is clear that for the second and third defendants to be liable, the actual tortfeasors must not only be named but they must also be brought in as defendants in the suit. The naming of the tortfeasors means the actual naming of the various persons alleged to have committed some tortious act against the plaintiff. This would include the names of the immigration officers who physically prevented the plaintiff from proceeding on her journey, who detained her at the Second Link and who told her that she had been blacklisted by the Royal Malaysian Police. The tortfeasors would include the police officers at the Second Link and at Balai Polis Larkin as the persons who detained her, who curtailed her freedom and who handcuffed her in public (see para 26).

(3) In carrying out investigations into criminal offences, a high degree of

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confidentiality would be necessary to ensure the success of police operations and investigations. The plaintiff's complaints about the delay in recording her statement and the failure to respond to her and her counsel's calls were frivolous. In any event, under s 107A, it is the officer in charge of a police station and not the investigation officer who should give the status report, if it would not adversely affect the investigations. As such, the plaintiff's claims against the defendant on this score was clearly unsustainable (see para 33).

(4) The case was registered in NCVC 4 and thus should be completed within nine months. The court had on 6 May 2011 fixed hearing dates on 25–26 July 2011. The defendant's application for striking out filed on 5 May 2011 was first scheduled for hearing on 19 May 2011 but was adjourned at the request of the plaintiff as counsel was on maternity leave. The hearing dates were fixed even though the documentation necessary for a full trial had yet been filed by the parties. Thus, the striking out application was not an afterthought or designed to delay the hearing of the action (see para 35).

(5) This was a plain and obvious case where recourse should be had to the summary process under O 18 r 19(1)(a), (b) and (d) as the plaintiff's claim disclosed no reasonable cause of action, was scandalous, frivolous and vexatious and clearly an abuse of the process of the court (see para 38).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa laporan polis yang palsu telah dibuat terhadapnya oleh seorang Vijay Krishnan Mehta. Dia mendakwa bahawa walaupun telah membuat laporan polis pada 12 April 2007 dan mengekshibitkan salinan paspot yang menunjukkan bahawa dia berada di Singapura antara 8 Jun 2004 dan 22 Jun 2004, dan menulis sepucuk surat bertarikh 31 Mei 2007 kepada defendan pertama sebagai penyiasat pegawai, bahawa dia tidak dipanggil untuk merekodkan kenyataannya. Sebaliknya, dia ditahan oleh Jabatan Imigresen Malaysia dan diserahkan kepada pihak polis di Second Link. Dia kemudiannya diserahkan kepada seorang pegawai polis dari Balai Polis Larkin, digari di hadapan orang ramai dan dibawa ke Larkin di mana dia ditahan di lokap. Dia hanya dimaklumkan bahawa dia ditahan berhubung kes penipuan yang melibatkan jutaan Ringgit dan dikemukakan di hadapan majistret pada 24 Februari 2008. Pada 26 Februari 2008, plaintif telah membuat laporan polis terhadap defendan pertama berkaitan tindakan cuai dan tindakan-tindakan mala fide. Dia juga telah menulis beberapa surat kepada defendan pertama untuk menyatakan kesediaannya untuk hadir bagi maksud penyiasatan tetapi telah tidak mendapat sebarang respon. Plaintif mendakwa bahawa berikutan penahanan oleh pihak polis di mananya digari dan terpaksa bermalam di lokap, dia mengalami tekanan dan kesihatan mental dan fizikalnya merosot dan dia terpaksa mendapatkan rawatan psikiatri. Defendan mendakwa bahawa

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defendan pertama dan kedua bukan pihak-pihak yang telah menangkap dan menahan plaintif dan oleh itu, mereka bukanlah pihak-pihak yang sepatutnya didakwa dalam kes ini. Defendan-defendan memohon untuk membatalkan writ saman dan pernyataan tuntutan plaintif di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan-alasan yang berikut: (i) bahawa plaintif telah gagal untuk menamakan pelaku-pelaku tort dalam tuntutan itu; dan (ii) bahawa defendan kedua tidak seharusnya dinamakan sebagai defendan. Plaintif membangkitkan bantahan awal atas alasan permohonan defendan cacat dan bahawa defendan telah gagal untuk memasukkan kehadiran bersyarat sebagaimana yang diperuntukkan di bawah A 12 k 6 KMT sebelum memfailkan permohonan sedia ada. Sebaliknya, defendan telah memfailkan pernyataan pembelaan mereka. Plaintif selanjutnya menghujahkan bahawa permohonan untuk membatalkan mesti ditolak selepas tindakan yang telah ditetapkan untuk perbicaraan.

Diputuskan, membatalkan tuntutan plaintif dengan kos:

(1) Mahkamah cenderung untuk mengikut keputusan dalam kes *N Carrupaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389, *Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme & Ors* [1987] 2 MLJ 633 dan *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 dalam memutuskan bahawa pemfailan kehadiran tanpa syarat oleh defendan tidak menghalang mereka daripada memfailkan permohonan pembatalan di bawah A 18 k 19 KMT (lihat perenggan 15).

(2) Atas kekuatan ss 5 dan 6 Akta Prosiding Kerajaan 1956, undang-undang adalah jelas bahawa defendan kedua dan ketiga adalah bertanggungan, pelaku-pelaku tort sebenar mestilah bukan sahaja dinamakan tetapi mereka juga mesti dinamakan sebagai defendan dalam saman itu. Penamaan pelaku-pelaku tort bermaksud penamaan sebenar beberapa orang yang didakwa telah melakukan beberapa perbuatan tort terhadap plaintif. Ini termasuklah nama-nama pegawai-pegawai imigresen yang secara fizikalnya menghalang plaintif daripada meneruskan perjalanannya, yang ditahan di Second Link dan yang memberitahunya bahawa dia telah disenaraihitamkan oleh Polis Diraja Malaysia. Pelaku-pelaku tort termasuklah pegawai-pegawai polis di Second Link dan di Balai Polis Larkin, sebagai orang-orang yang menahan, yang menyekat kebebasan dan yang menggari di khalayak ramai (lihat perenggan 26).

(3) Dalam menjalankan penyiasatan ke atas kesalahan jenayah, tahap kerahsiaan yang tinggi perlu untuk memastikan operasi dan siasatan polis berjaya. Aduan plaintif mengenai kelewatan dalam rakaman kenyataannya dan kegagalan untuk respon kepadanya dan peguamnya adalah remeh. Dalam apa jua keadaan, di bawah s 107A, ia adalah

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pegawai yang bertugas di balai polis dan bukan pegawai penyiasat yang sepatutnya memberikan status laporan, jika ia tidak akan menjejaskan siasatan. Oleh itu, tuntutan plaintif terhadap defendan pada hal ini jelas tidak mampan (lihat perenggan 33).

(4) Kes telah didaftarkan di NCVC 4 dan perlu diselesaikan dalam tempoh sembilan bulan. Mahkamah, pada 6 Mei 2011, telah menetapkan tarikh perbicaraan pada 25–26 Julai 2011. Permohonan defendan untuk pembatalan difailkan pada 5 Mei 2011 adalah pertama kali dijadualkan untuk pendengaran pada 19 Mei 2011 tetapi ditangguhkan atas permintaan plaintif kerana cuti bersalin. Tarikh-tarikh pendengaran ditetapkan walaupun dokumentasi yang diperlukan untuk perbicaraan penuh belum difailkan oleh pihak-pihak. Oleh itu, permohonan pembatalan bukan sesuatu yang difikirkan kemudian atau dibuat untuk menangguhkan pendengaran tindakan (lihat perenggan 35).

(5) Ini adalah satu kes yang nyata dan jelas di mana bantuan perlu diberikan kepada proses ringkasan di bawah A 18 k 19(1)(a), (b) dan (d) kerana dakwaan plaintif tidak menyatakan kausa tindakan yang munasabah, bersifat skandal, remeh dan menyusahkan dan jelas satu penyalahgunaan proses mahkamah (lihat perenggan 38).]

Notes

For cases on action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7428–7473.

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 208–226.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

Anchorage Mall Sdn Bhd v Irama Team (M) Sdn Bhd & Anor [2001] 2 MLJ 520, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme & Ors [1987] 2 MLJ 633 (folld)

Boey Oi Leng v Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405, HC (refd)

Government of the State of Sabah v Syarikat Raspand (suing as a firm) [2010] 5 MLJ 717; [2010] 7 CLJ 945, CA (refd)

Haji Abdul Rahman v Government of Malaysia & Anor [1966] 2 MLJ 174; [1966] 1 LNS 60 (refd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (folld)

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Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lim Seak Huat v Malayan United Realty Sdn Bhd [1997] 5 CLJ 336, HC (refd)

N Carrupaiya v MBf Property Services Sdn Bhd & Anor [2000] 4 MLJ 389; [2000] 4 CLJ 116, HC (folld)

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226, FC (refd)

Legislation referred to

Criminal Procedure Code s 107A

Government Proceedings Act 1956 ss 5, 6

Rules of the High Court 1980 O 12 r 6, O 18 r 19, O18 r 19(1)(a), (b), (d)

Ajeet Kaur (Saha Deva Arunasalam with him) (Saha & Associates) for the plaintiff.

Azlina bt Mahmod (Maisarah Juhari, Federal Counsel with her) (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Amelia Tee Abdullah JC:

[1] The defendants had, vide encl 6, applied to strike out the plaintiff's writ of summons and statement of claim under O18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC') on the grounds that the plaintiff had failed to disclose a reasonable cause of action against the defendants, that her claims were frivolous and vexatious and an abuse of the process of the court. The reasons stated in encl 6 for the application are:

(a) that the plaintiff had failed to name the tortfeasors in the claim; and

(b) that the second defendant should not have been named as a defendant in this case.

No affidavit was filed by the defendants in support of this application.

[2] The plaintiff, in her *afidavit jawapan* (encl 8), had raised a preliminary objection to the effect that the defendants' application was defective and not in compliance with O18 r 19 of the RHC of the RHC in that the defendants had failed to enter conditional appearance as provided under O18 r 6 of the RHC 1980 before filing the present application. Instead, the defendants had filed its statement of defence and this would clearly indicate that there were issues to be tried.

[3] In para 9 of encl 8, the plaintiff avers that the defendants' application is but an afterthought, made with the intention of delaying the hearing which had been fixed for 25 July 2011 and 26 July 2011.

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[4] The plaintiff refers to para 10 of the defence where the defendants had admitted that the plaintiff had been blacklisted as a wanted person. The reason given was that the plaintiff could not be traced to have her statement recorded to assist in police investigations. As the plaintiff had never changed either her address or her telephone number, she avers that the first defendant had failed, was negligent or had refused to trace and call her to have her statement recorded. Instead, the first defendant had taken a shortcut in arbitrarily blacklisting her.

[5] The plaintiff states that she had been advised by her solicitors that she had clearly, correctly and accurately ('secara jelas, betul dan tepat') named her tortfeasors in her claim, namely the first defendant in para 2, the second defendant in para 3 and the third defendant in para 4 because all the actions taken by the police against her were on the instructions of the first defendant, full particulars of which were allegedly set out in para 21 of her statement of claim. In para 12 of encl 8 she avers that her claim against the second defendant is as the party responsible for all the official acts and duties of the Royal Malaysian Police, including that of the first defendant. The claim against the third defendant is for vicarious responsibility for the failure of the first and second defendants in carrying out their duties.

[6] The plaintiff avers that she is the fourth defendant in Civil Suit S6–22–751 of 2006 filed by Clutch Auto Ltd and Vijay Krishnan Mehta and that a false report had been lodged against her by the said Vijay Krishnan Mehta. In her affidavit, she took issue over the fact that despite lodging a police report on 12 April 2007 and exhibiting a copy of her passport which shows that she was in Singapore between 8 June 2004 and 22 June 2004, and writing a letter dated 31 May 2007 to the first defendant as the investigating officer, she was not called to have her statement recorded. Instead, she was detained by the Malaysian Immigration and handed over to the police at the Second Link. She was then handed over to a police officer from Balai Polis Larkin, handcuffed in front of many people and brought to Larkin where she was detained in the lock up. She was only informed that she was being detained in relation to a fraud case involving millions of Ringgit and produced before the magistrate on 24 February 2008.

[7] According to the plaintiff, the police at the Second Link and Larkin 'telah memaklumkan dan mengesahkan bahawa pegawai penyiasat adalah Chief Inspektor Wong Peng Teck dari Kuala Lumpur dan hanya memaklumkan bahawa saya telah ditahan atas arahannya'.

[8] On 26 February 2008, the plaintiff had lodged a police report against the first defendant in connection with the latter's negligent and mala fide actions. She had also written several letters to the first defendant to express her readiness

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to attend for purposes of investigation but had received no response. Further letters dated 8 June 2008, 25 April 2008 and 6 May 2008 to the first defendant, the Ketua Balai Brickfields and the attorney general's chambers respectively also elicited no response.

[9] The plaintiff claims that following her detention by the police where she was handcuffed and had to spend a night in the lock up, she had suffered stress, difficulty in sleeping, nightmares and a fear of venturing out alone. She often cried and was unable to control her emotions. She became fearful when people knocked at her door, her mental and physical health declined and she had to seek psychiatric treatment at the University of Malaya Specialist Centre.

THE PRELIMINARY OBJECTION

[10] As stated earlier, the plaintiff has raised a preliminary objection to encl 8. The plaintiff submits that the defendants had failed to enter conditional appearance as provided under O 12 r 6 of the RHC 1980 before filing the present application but had instead filed its defence. The plaintiff submits that this would clearly indicate that there are indeed issues to be tried. As submitted by the plaintiff 'On the face of the pleadings there are issues to be tried'.

[11] In support of this argument, the plaintiff has cited the case of *Anchorage Mall Sdn Bhd v Irama Team (M) Sdn Bhd & Anor* [2001] 2 MLJ 520. In that case, the question that arose for consideration was whether the defendant, who had filed unconditional appearance, was precluded from making an application under O 18 r 19 of the RHC to strike out the writ and statement of claim filed by the plaintiff. The defendant had argued that from the language employed by the provisions under O 18 r 19, it was clear that an application to strike out a statement of claim can be made at any stage of the proceedings. The High Court, in allowing the preliminary objection had followed the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241. Ahmad Maarop JC (as His Lordship then was) had followed Abdul Malik Ishak J in *Lim Seak Huat v Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 when he had cited *Alor Janggus* as follows:

> It is now too late for the defendants to invoke O 18 r 19 of the RHC because they must have filed their unconditional appearance, thus depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 of the RHC if they are so minded.

[12] In response, learned senior federal counsel had submitted that the decision in *Alor Janggus* is only obiter. She had drawn the court's attention to

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the case of *N Carrupaiya v MBF Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389; [2000] 4 CLJ 116, where Hishamudin Yunus J, in referring to *Alor Janggus*, had held as follows:

> With respect, I must differ. In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under O 18 r 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, O 18 r 19 expressly provides that such an application may be made at any stage of the proceeding. The words 'at any stage of the proceedings', to my mind, strongly imply that the right to make an application under O 18 r 19 is not conditional upon the filing of a conditional appearance. Such an application may be made, for example, after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. Normally, a statement of defence is filed only after the filing of an unconditional memorandum of appearance; or, if a conditional appearance had been previously filed, the statement of defence is filed only after the conditional appearance has, by operation of law, become an unconditional appearance.

[13] In the case of *N Carrupaiya*, Hishamudin Yunus J had followed the decision of Zakaria Yatim J (as he then was) in *Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme & Ors* [1987] 2 MLJ 633 where His Lordship held that O 18 r 19 does not specify a time limit during which a party may apply to the court to strike out a pleading. Also referred to was the decision of Haidar J (as he then was) in *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 where the court followed the decision in *Bank Bumiputera Malaysia*.

[14] Referring back to the decision of Hishamudin Yunus J in *N Carrupaiya*, His Lordship had stated in p 395 (MLJ), p 122 (CLJ) as follows:

> I shall now revert to *Alor Janggus*. In the light of the authorities and the expressed provision of O 18 r 19 itself, the remark of Jemuri Serjan CJ (Borneo) in that case to the effect:
>
> It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.
>
> is, to my humble mind and with the greatest respect, rather unsettling. For such a statement implies that an O 18 r 19 application can only be made if the defendant had previously filed a *conditional* appearance (as opposed to an *unconditional* appearance). In all humility, I find great difficulty in understanding this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view — that the filing of an unconditional appearance precludes a defendant from making an O 18 r 19 application; nor were authorities cited to support the proposition. I find that there is absolutely nothing

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either in the provision of O 18 r 19 or in the provisions of O 12 rr 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to run counter to the express provisions of O 18 r 19 which clearly stipulates that the application may be made at any stage of the proceedings.

[15] In light of the fact that that brief remark of Jemuri Serjan CJ (Borneo) is merely an obiter dicta which is not binding upon this court, the court is inclined to follow the decisions in *N Carrupaiya, Bank Bumiputera Malaysia Bhd* and *Jamir Hassan* in finding that the filing of an unconditional appearance by the defendants do not preclude them from filing a striking out application under O 18 r 19 of the RHC.

PRINCIPLES OF LAW IN STRIKING OUT APPLICATIONS

[16] The principles of law in relation to striking out applications are clear. The case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 was relied upon by both parties. In that case, His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ had stated as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)) …
>
> ... It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v Lawson* (1915) 31 TLR 418 (CA)); (*Wenlock v Moloney*).

[17] Both parties have submitted on and are in agreement that in an application to strike out pleadings under O 18 r 19(1)(a) of the RHC, no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action. In the case of *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, the Federal Court held as follows:

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It is therefore clear that in an application to strike out pleadings under O 18 r 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the fact of the pleadings, the court is prepared to say that the cause of action or the defence is obviously unsustainable (see *Attorney-General of the Duchy of Lancaster v and Lancaster v London & North Western Railway Co Co* [1892] 3 Ch 274).

THE DEFENDANTS' APPLICATION

[18] The defendants' application is premised on two broad grounds, namely:

(a) that the plaintiff's claims have no reasonable cause of action as she had failed to name the actual tortfeasors; and

(b) the plaintiff's claim re the first defendant's failure to supply a report on the status of investigations discloses no reasonable cause of action, is frivolous, vexatious and an abuse of the court process.

The first ground — whether actual tortfeasors named

[19] The plaintiff's first ground is made pursuant to O 18 r 19(1)(a) in that the statement of claim discloses no reasonable cause of action as the plaintiff had failed to name the actual tortfeasors. In the statement of claim the plaintiff had alleged as follows:

(a) The plaintiff was prevented from proceeding to Singapore to visit and take care of her beloved uncle who had undergone a bypass operation when she was detained at the second link by an immigration officer. She was informed by the said immigration officer that she had been blacklisted by the Royal Malaysian Police and was not allowed to leave Malaysia (para 9 of the SOC).

(b) She was handed over to the police at the Second Link before being handed over to a police officer from Balai Polis Larkin at about 10.30pm. She was not informed of the grounds of her arrest. She was also handcuffed in public and brought to Balai Polis Larkin. She was detained overnight at Balai Polis Larkin and it was only when she was produced before a magistrate the next day that she was informed that she was being detained in respect of a fraud case involving millions of Ringgit (para 10 of SOC);

(c) The police at the Second Link as well as Balai Polis Larkin had informed her that the investigating officer was the first defendant, Chief Inspector Wong Peng Teck, and that the plaintiff was detained on his instructions (para 11 of the SOC).

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(d) On 24 February 2008, a police officer named Inspector Wirawati from Balai Polis Nusajaya had brought the plaintiff before the magistrate to obtain an order for remand (para 14(a) of the SOC).

(e) police officers had threatened the plaintiff that if she refuses to bath they would not give her breakfast. She was forced to bath together with other detainees. She complained that this was a frightening experience which had also outraged her modesty (para 19 of the SOC).

[20] Learned senior federal counsel had submitted that the plaintiff had not named the tortfeasors even once and that because of such failure; the plaintiff's claims disclosed no reasonable cause of action and would therefore fail. She argues that the first and second defendants were not the parties who had arrested and detained the plaintiff and that they were therefore not the right parties to be sued in this case. As the plaintiff's claims disclose no reasonable cause of action, she submits that the court has the power to strike out the plaintiff's entire claim.

[21] It is the defendants' submission that in any claim against the government, the officer of the government must be made a party and his liability must be established before the government can be made liable vicariously. It is insufficient to merely identify the officer without joining the officer as a party because liability by evidence would need to be established first. It is only upon a successful claim against the officer personally that a claim can be laid against the government.

[22] Sections 5 and 6 of the Government Proceedings Act 1956 reads as follows:

> Liability of the Government in tort
>
> Subject to this act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> Limits of Liability of the Government
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

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[23] In the case of *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, the appellants were the Government of Malaysia and the State Governments of Negeri Sembilan, Perak and Selangor. The respondents were 184 respondents who had allegedly suffered from the Japanese Encephalitis (JE/Nipah virus) or were dependants of persons who had died from the virus or owners of pig farms affected by the virus. The affected respondents had requested the appellants to cull the pigs to contain the spread of the virus. Subsequently, they brought an action against the appellants, inter alia, for negligence on the ground that the appellants did not act fast enough to contain the spread of the virus. They claimed that the appellants allowed the situation to worsen to such an extent that it caused them to suffer injury. The SAR struck out the action pursuant to O18 r 19(1)(a), (b) and (d) of the RHC. The High Court affirmed the SAR's decision. The respondents' appeal to the Court of Appeal was allowed with no order as to costs. On further appeal by the appellants, the Federal Court, in allowing the appeal, held, inter alia, as follows:

> In any claim in tort against the government, the government officer who was responsible for the alleged tortious act must be made a party and his liability must be established before the government could be made vicariously liable as principal (ss 5, 6 of the Government Proceedings Act 1956). It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needed to be established. It was only upon a successful claim against the officer personally could a claim be made against the government.

[24] In the case of *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717; [2010] 7 CLJ 945, the Ministry of Primary Industries Malaysia had approved the respondent's application to import logs for sale to local sawmills in Tawau. The appellant seized a total of 3,056 logs on suspicion that offences under the Sabah Forest Enactment 1968 had been committed. The Tawau Magistrate's Court ordered the logs to be returned to the respondent and the logs were so returned. The respondent then commenced an action for wrongful seizure of the logs against the appellant only. No other tortfeasors were named as defendants. The High Court held the appellant liable for wrongful seizure of the respondent's logs and allowed the claim. The appellant in his appeal had claimed that the respondent's action was tort based but the respondent had only named the Government of the State of Sabah as defendant without naming the alleged tortfeasors and as such the action was not sustainable in law. In allowing the appeal, Low Hop Bing JCA held as follows:

> Section 6 expressly prohibits the bringing of any proceedings against the government for damages under s 5 unless the action for such wrongful act, neglect, or default would have lain against the officer personally. This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's

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liability (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government. Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto.

The Court of Appeal in *Raspand*'s case had also considered the High Court case of *Haji Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174; [1966] 1 LNS 60. There the plaintiff had brought an action to recover damages arising out of a traffic accident in which a government steam roller had been parked on the road at night. The deceased motorcyclist had crashed into the steam roller. The issue that arose for consideration was whether the action against the government as principal was bad in law. The High Court, after examining ss 5 and 6 of the Government Proceedings Act 1956, concluded that the identity and liability of the government servant must be ascertained and established before the government could be made liable.

[25] On the issue of whether the tortfeasors had been named, learned counsel for the plaintiff had submitted that the three defendants had been named as tortfeasors. Learned counsel had submitted that the tortfeasor is the first defendant and that it was the actions of the first defendant that had caused the plaintiff to be detained. The plaintiff had also alleged that the first defendant had admitted to blacklisting the plaintiff.

[26] The court has carefully perused the statement of claim as well as the written submissions of both parties. The court finds that on the strength of ss 5 and 6 of the Government Proceedings Act 1956 and the authorities of superior courts cited by learned senior federal counsel, the law is clear that for the second and third defendants to be liable, the actual tortfeasors must not only be named but they must also be brought in as defendants in the suit. The naming of the tortfeasors means the actual naming of the various persons alleged to have committed some tortious act against the plaintiff. This would include the names of the immigration officers who physically prevented the plaintiff from proceeding on her journey, who detained her at the second link and who told her that she had been blacklisted by the Royal Malaysian Police. The tortfeasors would include the police officer at the Second Link as well as the police officer at Balai Polis Larkin as the persons who detained her, who curtailed her freedom and who handcuffed her in public. Who was the police officer who detained her overnight at Balai Polis Larkin? What were the names of the police officers at the second link and Balai Polis Larkin who had informed her that the investigating officer was the first defendant? What were the names of the police officers who had threatened the plaintiff that she would be given breakfast if she refused to take a bath?

[27] The court finds that not only were these tortfeasors not named but they were also not joined in as defendants in this action. The court notes that

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A although an Inspector Wirawati from Balai Polis Nusajaya was named as the person who had brought the plaintiff to the magistrate for the purpose of obtaining an order for remand on 24 February 2008, however the said Inspector Wirawati was not joined as a defendant.

B

[28] The naming of these tortfeasors is essential to enable the court to link the alleged tortious acts committed against the plaintiff with the first defendant. The court finds no admission by the first defendant to the effect that it was he who had blacklisted the plaintiff. The court further finds that only
C naming the first defendant and alleging that he is the person who was responsible for everything that had happened to the plaintiff, for all the tortious acts that were committed by a myriad of persons against the plaintiff, runs contrary to ss 5 and 6 of the Government Proceedings Act 1956 and established authorities on this issue.

D

The second ground — was the first defendant was in breach of his duties

[29] The second issue relates to whether the first defendant was in breach of
E his duties. He is alleged in the statement of claim to have:

(a) failed to call the plaintiff to have her statement recorded immediately after the plaintiff had lodged her police report on 12 April 2007;

(b) failed to take note of or take action on the plaintiff's police report; and
F

(c) failed to provide any feedback in relation to the investigations pursuant to s 107A of the Criminal Procedure Code.

[30] It is submitted by learned senior federal counsel that the plaintiff's
G claims against the first defendant as outlined in para 29 above discloses no reasonable cause of action, is frivolous, vexatious, and an abuse of the court process. The basis for this submission is the provisions of s 107A of the Criminal Procedure Code which reads as follows:

H

Report on status of investigation

107 A(1) Any person who has given information under section 107 may request for a report on the status of the investigation of the offence complained of in his
I information from the officer in charge of a police station where he gave the information.

(2) The officer in charge of a police station shall give a status report on the investigation of such offence to the informant not later than two weeks from the receipt of the request made under subsection (1).

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(3) Notwithstanding subsection (2), no officer in charge of a police station shall be required to provide a status report on an investigation of an offence —

(a) unless the offence complained of is a seizable offence;

(b) unless a period of four weeks has lapsed from the date of the giving of the information under section 107; and

(c) which contains any matter that is likely to adversely affect the investigation into the offence or the prosecution of the offence.

[31] It is the defendant's submissions that the first defendant as the investigation officer is protected from supplying any status report of an investigation of an offence. Informing the plaintiff about the investigation would jeopardise the investigation. As such it is submitted that the plaintiff's claims are obviously unsustainable as the claims disclose no reasonable cause of action, are frivolous and vexatious and an abuse of the process of the court.

[32] A number of authorities have been cited to highlight what would constitute a frivolous and vexatious claim. In *Boey Oi Leng v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405, it was held by the court that:

> A petition may be described as 'frivolous' or 'vexatious' where it is obviously unsustainable eg. where the petition is res judicata, or where the wrong party is being sued, or without merit and unjustified: see *Malaysian High Court Practice*.

[33] The court notes the plaintiff's submissions about the lack of action or inaction of the first defendant. On this issue, the court finds that the plaintiff's claims on this score are obviously misplaced and unsustainable. Mere failure to respond as the plaintiff would have liked would fall far short of a tortious act for which liability could be attached. It must be borne in mind that in carrying out investigations into criminal offences, a high degree of confidentiality would be necessary to ensure the success of police operations and investigations. The court finds the plaintiff's complaints about the delay in recording her statement and the failure to respond to her and her counsel's calls to be frivolous, to say the least. In any event, it must be noted that under s 107A, it is the officer in charge of a police station and not the investigation officer who should give the status report, if it would not adversely affect the investigations. As such, the court finds the plaintiff's claims against the defendant on this score to be clearly unsustainable.

[34] One last issue. The plaintiff vide further submissions (two) dated 12 July 2011, way after the second round of submissions on 21 June 2011, has submitted the case of *Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme Osman; Bank Bumiputera Malaysia Berhad & Anor v Lorrain Esme & Ors* as the

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authority for the proposition that an application for striking out must be refused after the action has been set down for trial.

[35] On this issue, it must be borne in mind that the present case is registered in NCVC4. The case was registered on 23 February 2011 and should be completed within nine months. After case managements held on 17 March 2011, 14 April 2011 and 22 April 2011, the court had on 6 May 2011 fixed hearing dates on 25–26 June 2011. The defendant's application for striking out filed on 5 May 2011 was first scheduled for hearing on 19 May 2011 but was adjourned at the request of the plaintiff as counsel was on maternity leave. From court records the hearing dates were fixed even though the parties had yet to file all necessary documentation such as the bundle of pleadings, agreed facts, agreed issues to be tried, common bundle, and witness statements because the court's hearing dates were fast depleting and to afford the parties' representatives some choice as to hearing dates. The court notes that even as to date, all the aforementioned documentation necessary for a full trial have yet been filed by the parties. As such, the court is unable to find that the defendants' striking out application is either an afterthought or was designed to delay the hearing of the action. On the contrary, the court finds the plaintiff's submission on this score to be without merit and would dismiss it accordingly.

CONCLUSION

[36] In conclusion, the court finds that the plaintiff had failed to name the alleged perpetrators of the tortious acts committed on her as well as to join them as defendants in this action. As regards the tortious acts that were alleged to have been committed by the first defendant as a named tortfeasor, the court finds that merely saying that the whole chain of events is a result of the actions arid inactions of the first defendant is insufficient. The actual tortfeasors must still be named and made parties so that the first defendant as well as the other defendants can respond appropriately in order for the court to determine if their actions were indeed done on the instructions and at the behest of the first defendant.

[37] As regards the allegations about the first defendant's lack of action in relation to the conduct of investigations, the court finds the plaintiff's claim in this regard to be clearly unsustainable. The first defendant, as an investigation officer in the course of the conduct of investigations, is not required to inform the plaintiff of the status or developments. And once the claim against the first defendant is unsustainable, the claims against the second and third defendants would likewise fall.

[38] The court finds that this is a plain and obvious case where recourse should be had to the summary process under O 18 r 19(1)(a), (b) and (d) as the

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plaintiff's claim as it stands discloses no reasonable cause of action, is scandalous, frivolous and vexatious and clearly an abuse of the process of the court. Accordingly, the court hereby orders that the plaintiff's claim against the defendants be struck out with costs to be taxed unless otherwise agreed.

Plaintiff's claim struck out with costs.

Reported by Kanesh Sundrum